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PROPER BOUNDS OF THE USE OF THE INJUNCTION IN LABOR DISPUTES

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The jurisdiction of equity to interfere by injunction to *some* extent in labor disputes cannot be seriously questioned at the present day. In issuing its restraining process in proper cases, the court exerts its authority, which is as old as the chancery itself, to prohibit those wrongful acts which will work irreparable injury to property rights for which the courts administering the common law can afford no adequate remedy. To the exercise of this power every member of the community is subject; and there is no reason why persons engaged in labor disputes should be granted immunity from it. In so far, therefore, as the courts restrain the performance by employer and workman alike of those acts only which plainly infringe upon the property rights of another person, to his immediate and irremediable damage, their action is clearly beyond the reach of legitimate criticism.

American labor leaders, however, protest with great energy against the use of the injunction to forbid acts that render the doer liable to criminal prosecution, upon the ground that since a violation of the injunction subjects the offender to punishment by fine and imprisonment for contempt of court, after a summary trial conducted by the equity judge alone, the effect is to deny him his constitutional right to be tried by a jury before he can be made to suffer criminal penalties.

This argument, in so far as it is grounded upon existing law, was finally and conclusively refuted by the Supreme Court of the United States in the celebrated Debs case (158 U. S. 564, 594), decided May 27, 1893. It was there pointed out that the power of equity to restrain the commission of acts destructive of property had never been regarded as in any degree curtailed by the fact that these same acts might also amount to offenses against the criminal law. The injunction is solely in aid of the civil liability of the wrongdoer

in favor of the person directly injured; and this is not affected by the existence of a concurrent criminal liability; wherefore it follows that the power of the court to issue the injunction being thus established, the power of the same court to punish violations of it in its own peculiar fashion is the same in nature and extent as in the case of any other lawful order of the court. Since, then, the punishment for contempt is not for a violation of the criminal law, but for disobedience to a lawful mandate of the court protecting certain civil rights, there is no violation of the offender's right to a jury trial in criminal prosecutions.

The labor unions charge that this distinction is purely verbal. Its substantial effect, they say, is to subject persons to penalties identical with those imposed by the criminal courts, without the protection of a jury trial, and with a very limited right of appeal. And if the law is as stated, it ought to be changed, either by forbidding the issue of injunctions at all against criminal acts, or else—what amounts to the same thing—by allowing a jury trial to persons accused of violating such an injunction, thus rendering a proceeding for contempt practically indistinguishable from an ordinary criminal prosecution.

Assuming such a statutory change in the established law to be constitutional, we may fairly impose upon those who advocate it the burden of proving its expediency. The justice of doing this becomes all the more apparent when it is borne in mind that, whatever may be urged against the injunction, its superior efficiency in suppressing strike disorders, as compared with the less summary methods of the criminal courts, has never been denied.

An examination of the reasons commonly urged against present practice in this particular would indicate that they are based largely upon abstract grounds. The gist of the complaint is that the arbitrary and uncontrolled power of punishment at present lodged in the hands of the equity judge is oppressive and tyrannical in tendency, and consequently un-American in character. But it may be pointed out in answer, that since equity practice in contempt cases, although well known to the framers of the constitution, was permitted by them to continue unchanged, and has been in existence without objection until the present agitation was begun, it can scarcely be branded as essentially contrary to the spirit of our institutions. Moreover there is nothing in our past experience during all that period

tending to show that this power has been tyrannically exercised, nor is there any reason to believe that the courts in the future will wield it in any other than a moderate, conservative manner. Unless, therefore, it is made to appear as a fact that the power is so employed as to cause the punishment of innocent men, either for offenses which they have not committed, or else for acts for which they ought not to be punished, those who advocate the proposed change in the law can expect little support from public opinion. But they have produced no convincing proof that proceedings for contempt thus tend to increase miscarriage of justice. So far as now appears, these trials have been fairly conducted. The accused has been given every opportunity to establish his innocence; and when he has been convicted, there has been little doubt that he had done the acts charged. Since, by our very hypothesis, the acts enjoined were criminal, it cannot be said that the accused ought not in good conscience to have been punished for them, or that in being forbidden to perform them he was unduly restrained of his liberty. It fairly appears, therefore, that up to the present time the labor leaders have not succeeded in making out their case against the use of the injunction against acts of this character.

A much more serious problem is presented by the action of the courts in forbidding, under certain circumstances, the doing of acts that are not ordinarily regarded as unlawful. Modern authority in this country does not sanction an injunction against the act of striking, singly or in combination, for a good or a bad reason. It is reasonably certain, moreover, that if the strike is begun for the purpose of directly advancing the substantial economic interests of the strikers, the courts will permit them to utilize a number of peaceful measures, in addition to quitting work, to force their employer to terms. Quiet and reasonable requests, persuasion and arguments, that do not partake in any degree of intimidation, may be addressed to workmen hired in the strikers' places to induce them to join the strike. They may also establish an orderly picket system about the employer's premises for the purpose of gathering information relative to the progress of the strike and of facilitating efforts to persuade and induce the new men to quit work. In some jurisdictions, the pickets may even address similar argument and persuasion to prospective customers of the employer to induce them to cease dealing with him during the continuance of the strike. And

the union officers may not be interfered with in the performance of their duties in relation to the strike, so long as they confine themselves to measures not unlawful per se. There is considerable authority, however, for the proposition that these same acts, if not inspired by "justifiable cause," give rise to legal responsibility to the party injured thereby, and may be enjoined regardless of their intrinsic nature, upon the theory that the malicious intent to harm another may render unlawful acts otherwise innocent.

The crucial issue in the labor law of to-day centers upon the "boycott," in the widest meaning of the term. Our discussion of the subject must be understood to relate only to the procurement of business isolation by means not unlawful per se, *i. e.*, peaceable persuasion of customers, not under contract, to sever their relations with the employer, or at most the compulsion resulting from a simple refusal on the part of union men to work for or deal with such customers unless they cease to do business with the person attacked.

The tendency in the earlier cases was to apply the "justification" test to these war measures as well as to others not intrinsically illegal. But the latest judicial utterances upon the subject exhibit a growing inclination on the part of the courts to prohibit unconditionally any attempt by the labor unions to exert pressure upon their enemies through the medium of disinterested third parties. This principle that "secondary boycotts" are unlawful has been copiously discussed in the latest decisions, notably in the now famous case, "*Buck's Stove and Range Co. vs. American Federation of Labor et al.*," through which, by reason of the drastic character of the injunction issued by the Supreme Court of the District of Columbia and the prominence of certain labor leaders who are now under a jail sentence for violating its terms, the subject has been forcibly brought to the attention of the public.

In examining the hotly-disputed question whether or not the American courts in holding secondary boycotts illegal and enjoinable have stepped beyond the proper limits within which the use of injunctions should be confined, we find that the arguments upon which it is attempted to establish the illegality of such boycotts are reducible to two basic propositions: (1) Every man engaged in business has a legal right to a free market in which to purchase his labor and sell his product; (2) the acts of a combination of persons who, by the characteristic method of the boycott, render it difficult

or impossible for him to buy or sell in these markets violate his legal rights therein.

It may be conceded that every man has the right to a free access to the markets of purchase and sale, in the sense that he may not be wrongfully prevented from trafficking with such persons as are willing to negotiate with him, or from reaping such results as he may be able to gain from the negotiation. But it can hardly be contended that he has a right that persons with whom he desires to deal shall be wholly shielded from the influence apt to be exerted upon their judgments by considerations of their economic interests. If his legal rights are violated by the action of other persons in making it appear to prospective customers that their economic interests will be on the whole advanced by their dealing with some person other than the complainant, the very existence of a competitive market is rendered impossible. The right to a free market manifestly cannot extend as far as this. Something else than the damage suffered by reason of an inability to secure beneficial trade must be present in order that the law may say that the right to a free market has been infringed. A wrong is not complete unless the element of *injuria* is superadded to the *damnum*.

This element is attempted to be supplied by the second basic principle above set out. The *methods* employed in a boycott are held not only to damage the person attacked, but to infringe upon his legal rights as well. But the question immediately suggests itself as to wherein lies the infringement; and although it has exercised the courts ever since boycotts began to find their way into litigation, they have never been able to supply an answer which will stand the test of established law.

It is manifest, first of all, that there is nothing in the quality of the damage inflicted by a boycott to give it the character of a legal wrong. A stoppage of the labor supply of an establishment may lead as straight to bankruptcy as does a stoppage of the sale of finished goods, yet it is perfectly legal to strike and to persuade other persons to strike. Again, it is generally held that the conduct of a competitor in interfering with his rival's market of sale by underselling him, or by offering certain trade advantages to such customers as deal exclusively with himself, gives the rival no right of action, although it results, and is intended to result, in driving him out of the market. Neither the quantity nor the quality of the dam-

age so inflicted supplies the necessary element of *injuria*. As was said by Justice Van Orsdel, of the District of Columbia Court of Appeals, in his concurring opinion upholding the injunction issued by the court below: "It is not the injury of the complainant that measures the right of the courts to intervene, for a peaceable, lawful strike may inflict great injury, but it is the unlawful actions of the defendants directed against the rights of the complainant." (37 Wash L. Rep. 154.)

Many courts profess to find the necessary leaven of illegality in the "coercion" or "intimidation" practiced upon the complainant's customers to "compel" them to interrupt their trade relations with him. But a careful analysis of what the unions engaged in a peaceable boycott really do must reveal that their acts cannot be brought within the legal meaning of these terms. The unions simply impose conditions upon the continued bestowal of their business patronage, which they have an undoubted right to give or withhold as they will. They inform the person who has business relations with themselves and also with the person attacked, that in the future he may not deal with both parties to the dispute. He is required to choose between them. But his choice is untrammelled by any consideration other than that which influences the decision of every-one engaged in competitive business, *i. e.*, regard for his own economic welfare. He settles the question according to his determination as to whose patronage is the more valuable to him. This is "coercion" in only a figurative sense of the word. Indeed, the act of the union in placing the alternative before the customer may be equally well regarded as a promise to *reward* him for his severance of relations with the enemy by a *continuance* of their beneficial business intercourse which the unions may give to some one else if they will. It is extremely difficult, therefore, to see wherein these measures are illegal. How can civil liability spring from the act of one party in making it known to another that he will exercise his legal right not to do business with the other unless the other shall see fit to exercise his legal right to cease dealing with some third party? The unions are fairly entitled to all the benefits, direct or indirect, derivable by them from a bestowal of their patronage where they will—to deal with those whom they consider their friends rather than with those whom they regard as allied with their enemy.

The person who asks for an injunction to restrain a peaceable boycott is able to show to the court only that the defendants have put his customer into a position wherein he was obliged to decide whether he preferred their patronage to the complainant's, and that the customer, governed by economic considerations, had decided to retain the patronage of defendants, to the complainant's loss. Here is *damnum*, but where is the *injuria*? The complainant has no vested right in the mental state of another person. He cannot denounce as "intimidation" the natural regret which his customer may feel at being required to give up one line of patronage in order that he may keep another that is more valuable to him, and utilize it as a ground of action against those who made the choice necessary. Coercion by unlawful acts does give him just cause of complaint, upon the theory that illegal acts productive of damage to him are none the less wrongful as to him because they operate through the medium of third persons. But it is difficult to conceive of any theory upon which acts not unlawful as to the third party become wrongful as to the complainant merely because their operation is transmitted to him through the third person rather than directed immediately against himself.

The force of these considerations has caused the courts in some jurisdictions to seek further for the necessary taint of illegality in a boycott. Not infrequently they find it in the fact that the damage complained of has resulted from the action of a number of persons acting in concert. As a consequence there is developing a noticeable tendency upon the part of the American courts to hold that a combination of persons may not perform certain acts which each member of the combination would have a perfect right to do if acting singly, by reason of the vastly greater harm which can be inflicted by the combination.

From our present standpoint, a sufficient answer to this new principle is found in the firmly established principle of the common law, frequently reaffirmed in cases other than those arising out of labor disputes, that an act lawful in itself is not rendered unlawful by being done by a combination of persons. In other words, whatever a man has a right to do individually, he may legally do in concert with other men who possess similar rights. The contrary view would render unlawful every hostile act done by a labor union and productive of damage. Hence, in allowing concerted strikes, picket-

ing, etc., the courts in a manner estop themselves from attributing to the fact of combination any legal significance in boycott cases unless they can base a distinction upon the nature of the injury inflicted therein; and this, as has already been shown, cannot be done.

It should be noted also that this founding of liability upon the number of persons who join in the act takes no account of the damage of similar character that a single person, under present industrial conditions, might be in a position to inflict. The refusal of a single wealthy manufacturer or powerful corporation to deal with a person as long as he continues to deal with another might have an infinitely more "coercive" effect than would similar action by a local trade union. Yet, according to the principle under discussion, the damage caused by the action of the former would be *damnum absque injuria*, while that caused by the action of the latter would constitute a legal wrong.

A much more logical course is pursued by those judges who lay down broadly that no person or combination of persons may intentionally inflict damage upon another, even by methods not intrinsically unlawful, except for the purpose of securing some direct economic advantage to themselves commensurate with the injury done to the person attacked. The adoption of this principle should remove interference with peaceable boycotts inaugurated for "justifiable cause," while leaving in full operation the power to enjoin unjustifiable boycotts. There is some reason to believe, however, that even the adoption of this test would not legalize "secondary boycotts," upon the theory that the benefit expected by those engaged in it is not sufficiently direct or proportionate to the damage inflicted to constitute "justifiable cause."

The general adoption of the justification test would operate to bring the law more nearly into harmony with the moral sense of the community, and it may well be that future development will take this direction. Still, the new principle is undoubtedly at variance with the established rule of the common law, often cited and applied at the present time in other cases, that an act otherwise legal is not rendered unlawful by the existence of a bad motive in the mind of the doer.

The endeavor is sometimes made to disguise this conflict by saying that the unions have only a *qualified* right to do the inju-

rious acts complained of, and liken the case to that of slander or malicious prosecution, wherein the defendants must prove legal justification to escape liability. But there is no real analogy between the two cases. The law gives redress to every person who is injured by the utterance or publication of certain false statements about him. It affords him no redress if the statements are true. Consequently in cases of slander and libel the inquiry as to the truth of the charges is made solely for the purpose of determining which of these principles is applicable to the situation. If once it is shown that the statements were true, the defendant escapes liability although his motive in revealing the truth was in the highest degree malicious. Consequently, there is no "qualification" of rights at all. The defendant, in the absence of statutory or constitutional limitations, has the absolute right to utter or publish damaging truths, and no right at all to speak or publish damaging falsehoods.

The case of malicious prosecution is similar. The plea of justification grounded upon "probable cause" raises the issue in effect as to whether the false accusation preferred by the defendant was fraudulent or innocent. There is really no issue as to the motive inspiring the charge if the accuser had reasonable grounds for believing it to be true. The law is settled that a declaration in an action of malicious prosecution alleging merely that the defendant "wilfully, maliciously, and with intent to injure, preferred a false charge against the plaintiff," etc., but omitting an averment of want of "probable cause," will be held bad on demurrer as stating no cause of action. On the other hand, the right to bestow one's business patronage upon whomsoever he will is a right of such an absolute character that the common law supplies no warrant for an inquiry by any person into the reasons leading to its exercise.

A brief reference to a few of the difficulties in which the courts involve themselves in their endeavors to harmonize their decisions in labor cases with each other and with the established principles which they recognize in other fields, and which they insist are not departed from in labor cases, may be interesting and instructive.

In *Iron Molders' Union vs. Allis-Chalmers Company*, decided October 9, 1908, by the Federal Circuit Court of Appeals for the Seventh Circuit (166 Fed. 45), it was held that although a peace-

able "boycott" is illegal, the action of members of the defendant union employed in foundries other than the plaintiff's in notifying their employers that they would strike if the employers continued to accept patterns from the plaintiff's foundry to be made up into castings did not amount to a boycott. The only distinction sought to be drawn between this case and those in which laborers have been enjoined from refusing to work with or handle "boycotted" materials is based upon the fact that the present defendants had made no attempt "to touch appellee's dealings or relations with customers and users of its goods," but were only endeavoring to "control the supply and the conditions of the labor that is necessary to the doing of the work." This distinction, however, is of no real significance. The result of the defendants' action was to exert pressure upon third parties not interested in the dispute to "coerce" them to discontinue mutually profitable business relations with the plaintiff, so that the purpose intended, the methods employed, and the effect produced by the action of the union were subject to every objection usually urged against an ordinary boycott.

A similar instance of attenuated reasoning is presented by the Supreme Judicial Court of Massachusetts in the case of *Willcutt & Sons vs. Driscoll, et al.* (decided October 24, 1908, 200 Mass., 110), upholding an injunction to prevent a union from imposing a fine upon one of its members in accordance with its rules to induce him to join other members of the union in a lawful strike against their common employer. The court found the illegality of the union's action to consist in the "coercion" produced by the threat of fine, and in fact the entire course of reasoning is practically identical with that usually adduced to support injunctions in boycott cases. It distinguished the present case from *Mogul Steamship Co. vs. MacGregor* (1892), A. C. 25, in which the House of Lords upheld the action of the defendant company in charging higher transportation rates to persons who dealt with competing companies and thereby greatly injured the trade of the latter, by saying: "In that case there was simply a withdrawal of trade advantages under certain conditions." But this is all that is done in a peaceable boycott, so it would seem that this distinction, if consistently applied, would destroy the entire case against the boycott.

The state and federal courts hold legal with substantial uniformity the action of various combinations among merchants and

other employers in imposing fines upon their members, and in collectively ceasing to deal with non-members, for the purpose of maintaining certain beneficial conditions in the trade in which they are engaged. Many of these cases are irreconcilable with their decisions in boycott cases. The nature and incidents of the two classes of transactions are identical in principle, and the reasons relied on to support the holdings in each of the respective lines of cases are equally applicable to the other. A typical case is *Montgomery, Ward & Co. vs. South Dakota Retail Merchants and Hardware Dealers' Association*, decided by the Federal Circuit Court for the District of South Dakota, on February 1, 1907 (150 Fed. 413). An injunction had been asked against the action of a combination of retail merchants in refusing to deal with any jobber or wholesaler who should sell goods to a catalogue or mail-order house. The court, recognizing that "it is impossible to reconcile all the decisions bearing upon the power and authority of a court of equity to restrain by injunction combinations of persons having for their object an interference with the business of another," laid down generally that before an injunction should issue in such cases, "the court must find that the acts are unlawful. For damage arising from the commission of lawful acts, the law affords no remedy." And since the acts under review here were not unlawful, though injurious, the injunction was refused.

Finally, we cannot overlook the complaint of the labor unions that the courts with all their legal ingenuity have never been able to discover any principle whereby they can effectually protect the laborer from "blacklisting," although he may suffer greater proportionate damage therefrom than is inflicted upon an employer by even the most widespread boycott. The conclusion seems to follow, therefore, that the common law furnishes no sufficient authority to the courts for their action in issuing injunctions against secondary boycotts.

In its final analysis, however, the common law is what the courts of last resort declare it to be. It has no foundation other than that supplied by the doctrine of "*stare decisis*." Consequently it cannot be denied that in many states and federal circuits in this country secondary boycotts and other measures not illegal *per se*, are at the present time unlawful and enjoined by virtue of court decisions therein. But the latter will be adopted and followed else-

where only to the extent that they are regarded as consisting with the general spirit of the law or as representing wise applications of those broad principles of justice and expediency that pervade our entire legal system. And even in the jurisdiction of its origin, a decision must ultimately measure up to the same standard, else it is likely to be so explained, distinguished and limited as to be robbed of its vitality, if not openly overruled. Consequently, we are not precluded by these "anti-boycott" cases from discussing what should be the attitude of the courts toward boycotts in the future in view of the conclusion above expressed that the decisions holding them illegal and enjoined are not sustained by the pre-existing law.

In individualistic societies, industrial warfare seems at the present time to be inevitable, with its accompanying damage to the combatants and inconvenience to the public. Nevertheless, such conflicts should be begun only for a just and substantial *casus belli*, and the parties thereto should observe the rights of the innocent public and keep within the limits of ordinary humanity in their treatment of adversaries. In this particular the principles underlying the laws of war between nations may be profitably regarded. Now a certain amount of public sympathy is apt to be found enlisted upon the side of the person whose business is threatened with ruin by the inauguration of a boycott against him by a group of powerful labor unions. There is also in the minds of many people a belief, induced in considerable measure by past experience, that some of the men in control of these bodies cannot always be trusted to wield their authority with forbearance and wisdom. But no other than a conservative use of the vast powers of modern industrial combinations can be tolerated. Habitual abuse of such powers, to the unnecessary or inordinate damage of the public as a whole or of individual members, ought to be and will be restrained by law, without regard to the legality *per se* of the oppressive methods employed; and if existing law is inadequate, new laws should be made that will suffice.

In endeavoring to protect parties to labor disputes against injuries of whatever nature that are disproportionate to the needs of the situation, the courts voice a wise principle of public policy. It is the same policy which has received statutory expression in Wisconsin Statutes of 1898, sec. 4466-a, imposing imprisonment or

fine on "any two or more persons who shall combine . . . for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession, by any means whatever," etc., and which has been held constitutional by the Supreme Court of the United States in the case of *Aikens vs. Wisconsin* (195 U. S. 194—decided November 7, 1904).

We may concede that some restriction, worked out along the line suggested by this statute, should be placed upon the aggressions of parties to the dispute. But the question as to the limits of such restrictions presents a complex problem of economics and sociology, the solution of which must be gathered from a competent and exhaustive investigation of the facts of modern industrial life and organization, and not from a process of *a priori* reasoning professedly based upon common law principles developed under conditions far different from the present. An investigation of this character cannot be made by the courts in passing upon specific cases. It is a task for legislative commissions of qualified experts who can proceed unhampered by many of the obstacles that retard the course of judicial proceedings. The reports of these commissions should serve as the basis of carefully drawn statutes, such as may be reasonably expected to settle the matter upon some definite foundation. In the meantime, the judges should content themselves with applying the existing law, or at most extending it to cover only cases about which there can be no reasonable difference of opinion.

The present attitude of the American courts toward labor disputes tends to breed evils as serious as those which they are endeavoring to remedy. They announce that labor cases, like all others, must be decided according to law, not expediency, and the argument of counsel is largely confined to the discussion of legal, not economic, principles. Yet when the decisions are rendered it is too often apparent that the courts have in reality disregarded established legal principles in order to register pre-determined economic views based upon only a rudimentary knowledge of the situation. This fact cannot be disguised by the elaborate but palpably unconvincing reasoning upon which the decisions are professedly grounded. It is revealed very clearly by the conflicting decisions and especially the vigorous dissenting opinions that so abound in the field of labor law. The result is to engender in the minds of the laboring classes

a deep sense of injustice; a growing conviction that even the law of the land cannot overcome the bias of the courts in favor of the employing class. The consequent impairment of the workman's respect for and confidence in the courts is not to be lightly regarded. Its fruits are seen in the appearance of the anti-injunction bills, and demands that all judges shall be chosen by popular election and for short terms; upon the not unreasonable ground that if, instead of applying the law, the judges are also to make sweeping changes of questionable value in its content, the people should be in a position to exert due influence upon the process.

In the future, therefore, the courts will act the wise part if they interfere by injunction in labor disputes to restrain the doing of acts only that are plainly wrongful according to existing law. Requests for action that would involve unauthorized extensions of their power to prohibit should be refused, with the answer that the law does not warrant judicial interference with the acts complained of, and that changes of such radical character must be made by the legislative branch of the government.